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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

FAY HEASLEY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Fay Heasley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on January 13, 1955.

OPINIONS BELOW

The District Court rendered no opinion.

The opinion of the Court of Appeals for the Eighth Circuit, printed as Appendix A, *infra,* is reported at 218 F. 2d 86. The opinion of the Court of Appeals

denying rehearing, printed as Appendix E, *infra,* has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 13, 1955 (Appendix B, *infra*). Petition for rehearing was denied on July 18, 1955 (Appendix E, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Do not the principles established by this Court in the "net worth" decisions require that the decision below be reversed and that Petitioner be granted a new trial, because:

a. The trial judge charged that the opening net worth figure merely be "*satisfactorily* established," whereas this Court has held that the opening net worth must be established "*with reasonable certainty*" and has stressed "the importance of *accuracy* in this figure"?

b. Exhibit 82, the Government's summarization of Petitioner's net worth for the years 1943 through 1949—inaccurate by the Government's own admission that its investigation was incomplete—was permitted to be taken into the jury room *without any* cautionary instructions, whereas this Court has admonished that "guarding instructions" are necessary to prevent "the various charts summarizing the computations" from "acquiring an existence of their own, independent of the evidence which gave rise to them"?

c. The trial judge's charge dealing with net worth contained only a brief summary of the method, but did not refer to "the assumptions upon which it rests" nor did it mention any of "the inferences available . . . for . . . the accused," whereas this Court has held these to be essential in addition to the formal instructions in a net worth charge?

2. The starting point in the Government's net worth case was Petitioner's extra-judicial statement made in 1950, purportedly setting out his net worth as of January 1, 1944, and introduced at the trial as Exhibit 11 (App. 7, R. 14-15).[1] The trial judge did not mention this Exhibit in his charge.

The government introduced in evidence Petitioner's income tax returns for the years 1944 and 1945 (T. 167-168), but the prosecution years were 1946, 1947, 1948 and 1949 (R. 1-3). The trial judge sought to explain to the jury that the introduction of these returns was not to be taken as a suggestion that violations were claimed for the years 1944 and 1945, yet instructed the jury that the returns for these years

> "were received solely for use by the Government in establishing a base or starting point in proving its net worth theory" (R. 30).

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[1] This Petition makes reference to the following: Transcript of Testimony in the District Court and the Original Record of the proceedings below, both on file in the Office of the Clerk of this Court; the Record used in the Court below, which accompanies this Petition; and the Appendix to this Petition which is a part hereof. References to the Transcript of Testimony are designated by "T." references to the Original Record are designated by "O.R."; references to the Record as used in the Court below, accompanying this Petition, are designated by "R."; and references to the Appendix to this Petition are designated by "App."

The question presented is: under these circumstances, did not the trial judge's instruction regarding the 1944 and 1945 returns, however well intentioned, and the absence of any comment on Exhibit 11, so mislead the jury on a critical element in the case as to require reversal?

3. Petitioner was a farmer who had only a grade school education and had no knowledge of accounting or the requirements of the revenue laws. He turned all of the records he had over to an accountant, and relied upon the accountant to prepare his income tax returns (App. 2).

He had nothing to do with the preparation of the returns (T. 476) and relied entirely upon the advice of his accountant (T. 477). Indeed, Petitioner signed his income tax returns in blank in advance and the accountant "filled them out after I was gone" (T. 504, 526).

At the time of the trial the accountant was dead (App. 2) and consequently was unavailable to explain the treatment of various items on the returns.

The question presented is: under these circumstances, may the errors of omission and commission of the accountant be used to impute to Petitioner the criminal intent necessary to sustain a conviction under Section 145(b) of the Internal Revenue Code of 1939?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 145(b) of the Internal Revenue Code of 1939, 52 Stat. 513, as amended, 26 U. S. C. Section 145(b) provides as follows:

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT

Appellant was convicted in the United States District Court for the District of North Dakota on three counts of a four count indictment which charged him with willfully and knowingly attempting to defeat and evade a part of his federal income taxes for the years 1946, 1947, 1948, and 1949 (R. 1-3). He was acquitted on the fourth count of the indictment (R. 37). Appellant was sentenced to three years on each of the three counts, the sentences to run concurrently (R. 38).

The Court of Appeals for the Eighth Circuit affirmed the judgment and sentence of the District Court on January 13, 1955 (Appendix B, *infra*), in a decision reported at 218 F. 2d 86 (Appendix A, *infra*). No petition for rehearing was filed and the mandate of the Court of Appeals issued in due course (O. R. 57).

Thereafter, Petitioner's new counsel made application for leave to file a petition for rehearing out of time. This application was based upon the fact that—at the time a petition for rehearing to the Court of Appeals or a petition for a writ of certiorari to this

Court was necessary—appellant's original counsel was seriously ill, under constant medical supervision, and was undergoing surgery; that Petitioner, a farmer, was unequipped by training and education to himself understand the procedures in which he was involved; and that after briefs had been submitted and the case argued in the Court of Appeals but shortly before the Court of Appeals issued its decision, this Court had announced its "net worth" decisions which were directly applicable to the instant case.

The application for leave to file the petition for rehearing out of time was granted by the Court of Appeals on April 6, 1955, over vigorous Government opposition and Petitioner was granted leave to file a petition for rehearing on or before April 18, 1955 (Appendix C, *infra*). A petition for rehearing was timely filed (O. R. 59-68), and on May 31, 1955, the Court of Appeals ordered counsel for petitioner to file a full brief in support of the petition for rehearing, to which the Government was requested to make a reply (Appendix D, *infra*). On July 25, 1955, the Court of Appeals denied the petition for rehearing in a brief opinion holding that "after re-examination of the situation in the light of the 'net worth' decisions . . . the Court is convinced that the result reached in the previous opinion . . . was right and is entitled to stand . . ." (Appendix E, *infra*).

REASONS FOR GRANTING THE WRIT

I.

In *Holland* v. *United States*, 75 S. Ct. 127, this Court reviewed the development and use of the so-called net worth theory in tax evasion cases and noted that "it is so fraught with danger for the innocent that the Courts

must closely scrutinize its use." 75 S. Ct. at 130. It was further observed that the net worth method "has evolved from the final volley to the first shot in the Government's battle for revenue, and its use in the ordinary income-bracket cases greatly increases the chances for error." This, the Court concluded:

> "leads up to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases." 75 S. Ct. at 131.

There follows in the *Holland* and companion cases [2] a careful blueprint of the "pitfalls inherent" in the net worth method; of the types of jury charges preferred; of the need for careful investigations; of the limits in the "use of extra-judicial statements made by the accused"; of the need for corroboration; and of other similar important factors. In all, the opinions in the four cases were obviously intended as a general guide for courts and prosecutors of the principles applicable to the trial of criminal tax cases which involve the use of the net worth type of proof, and to set at rest the disturbing confusion which had developed in criminal tax cases of this type during the past two decades.

But the principles which these decisions establish can have force and effect only to the extent that they are carefully and consistently applied by the federal courts in appropriate cases. If they may be improperly applied, if they may sometimes be disregarded, the practical protection this Court so painstakingly fashioned loses its high function. Moreover, since

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[2] *Friedberg* v. *United States*, 75 S. Ct. 138; *Smith* v. *United States*, 75 S. Ct. 194; and *United States* v. *Calderon*, 75 S. Ct. 186.

there are dangerous pitfalls inherent in the net worth method, a failure to carefully control and restrict its use in accordance with the principles laid down by this Court may result in serious injustice to the innocent.

We believe that this case presents a striking instance in which these principles have been violated or ignored, with the result that Petitioner has been "ensnared" in the very dangers and pitfalls which it was this Court's announced intention in the net worth decisions to protect against.

A. The Standard for Establishing Opening Net Worth

Petitioner's opening net worth was established by an extra-judicial statement made by Petitioner in 1950 with regard to his net worth at the end of 1943. The Government's chief witness testified that this statement was *not* made up from any investigation of any records "with this one exception, I did obtain that figure from the bank . . . and I discussed that with Mr. Heasley and he stated that if that's what the bank showed, it was right, and the rest of the items he recited to me and I wrote them down as he did." (T. 23). This same Government witness also testified that in procuring the so-called opening net worth statement from Petitioner, Petitioner relied entirely on his memory without any records before him, with the exception of his 1944 income tax return (T. 367); that he said in 1950, seven years later, "As I recall it, I had land and buildings worth so much and bonds worth so much and machinery worth so much" (T. 367); and, that with regard to the liabilities figure in the statement, he "said that he didn't know what it was but probably $500 might be a fair estimate" (T. 368).

The information thus obtained was introduced at the trial as Exhibit 11 (T. 21, R. 14-15); and, tnough uncontradicted and uncontrovertible evidence was thereafter introduced to prove that some of the information contained in it was inaccurate (T. 449-454, 368-369), it nevertheless was permitted to serve as the "cornerstone of the Government's foundation of guilt." *cf. Smith* v. *United States,* 75 S. Ct. at 198.

When attack was made on the use of this extra-judicial statement to establish Petitioner's opening net worth, the Court below accepted the statement as alone "definitely" establishing the opening net worth:

> "Defendant signed and swore to a statement identified as exhibit 11 which reflected his net worth as of January 1, 1944. * * * This *definitely fixed a starting point* from which the Government accountants prepared exhibit 82 showing defendants net worth for the years 1946, 1947, 1948 and 1949." (App. 7). (Emphasis added.)

This view plainly does not accord with the rule adopted by this Court that an extra-judicial statement of a defendant may not be used to establish an opening net worth unless there is independent evidence to support it. *Smith* v. *United States,* 75 S. Ct. at 198; *United States* v. *Calderon,* 75 S. Ct. 186.[3]

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[3] The Court below also held:

> "The government in the instant case does not rely on this testimony [Petitioner's opening net worth statement] alone as proof of the *corpus delicti.* It is relied upon as corroborative of the facts sought to be established by the testimony as to defendant's to be established by the testimony as to defendant's receipts and disbursements for the years in question. Whether or not the testimony standing alone would

Notwithstanding, Petitioner's extra-judicial statement was introduced at the trial as Exhibit 11 and relied upon as proof of Petitioner's opening net worth. Exhibit 82, which was the Government's summarization of Petitioner's net worth for the years 1943 through 1949 (R. 16-17) begins with and is founded upon the information contained in Exhibit 11 (T. 310-311, 313). Thus, the deficiencies in Exhibit 11 are magnified in Exhibit 82; and the inaccuracies of Exhibit 11, as they are repeated and compounded in the successive columns of Exhibit 82, become meaningless distortions. For as this Court observed in *Smith* v. *United States, supra:* "without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed." 75 S. Ct. at 198. The "correctness of the result depends entirely upon the inclusion in the [opening net worth] sum of all assets on hand at the outset." *Holland* v. *United States, supra,* at 134.

Yet despite "the importance of accuracy in this figure," and despite the doubt cast upon it in this case (T. 449-454, 368-369), the trial judge did not mention the weaknesses inherent and exposed in Exhibit 11 in his charge. He did not caution the jury as to the

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be sufficient to establish the guilt of the defendant is not the test of its admissibility." (App. 7);

but this does not appear to comply with this Court's holding that the corroboration rule is applicable:

". . . whether we consider the statement and admission of one of the formal 'elements' of the crime *or of a fact subsidiary to the proof of these 'elements.'* It is the practical relation of the statement to the Government's case which is crucial, not its theoretical relation to the definition of the offense." *Smith* v. *United States,* 75 S. Ct. at 199. (Emphasis added.)

importance of this "element vital to the Government's case" *cf. Smith* v. *United States, supra,* at 198; indeed, he did not even mention Exhibit 11 in his charge.

Instead, he compounded the error by charging that

> "a starting point net worth must be *satisfactorily* established" (R. 29) (emphasis added).

But clearly this Court has asked for more than merely the "satisfactory" establishment of this crucial figure. "The importance of *accuracy* in this figure is immediately apparent," this Court has held, "as the correctness of the result *depends entirely* upon the inclusion in this sum of all assets on hand at the outset." *Holland* v. *United States, supra,* at 134. (Emphasis added.) An "essential condition in cases of this type is the establishment, *with reasonable certainty,* of an opening net worth . . ." *Ibid.* (Emphasis added). *cf. Balter, The "Net Worth" Decisions,* 41 A. B. A. J. 512, 515.

We think it is clear that the establishment of too loose—and therefore an incorrect—standard for proving Petitioner's opening net worth violated one of the fundamental principles of the "net worth" decisions; and, within the context of this case, constituted substantial and prejudicial error.

B. Failure to Caution Jury With Regard to the Government's Net Worth Summarization

It has already been noted that Exhibit 11—the opening net worth statement—relied upon by the Government was not drawn up from any investigation made by the Government, but was drawn instead almost entirely from the vague recollections of the Petitioner seven years after the year involved, p. 8, *supra.*

Exhibit 82, the Government's net worth summarization for the years 1944 through 1949, appears to have been drawn up and put together by an investigation almost as superficial. Thus, it should be noted that the adjusted gross income for each of the prosecution years shown in Exhibit 82 (R. 16-17) is substantially different from the adjusted gross income shown in Exhibits 88-1 through 88-4 (R. 22-25) derived by the Government through the receipts, disbursements and expenditures method. And while it may be true, as the Court below observed, that "exact proof as to the amount of net income evaded" is not required (App. 8), the Government's proof must still be *reasonably* consistent with itself. Certainly, a variation of over 100% for the same year in the reconstruction of Petitioner's adjusted gross income by the two supposedly alternative or conjunctive methods of proof[4] renders both methods thoroughly suspect.

One of the items which appears on the net worth summarization is "fencing", which is shown to have increased from $1,000 in 1943 to $8,500 by the end of 1949. The Government's chief witness testified that his source of information on fencing was from Petitioner's income tax returns (T. 378-379). The net worth summarization also showed substantial increases in "land",

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[4] Petitioner's adjusted gross income for the prosecution years as computed by the Government by the net worth method and the receipts, disbursements and expenditures method, and as set out in Exhibits 82 and 88-1—88-4 is as follows:

	Net Worth	Receipts and Disbursements
1946	$54,778.48	$26,394.54
1947	50,021.20	43,368.90
1948	64,094.89	58,164.78
1949	28,428.77	16,441.59

and, since "fencing" does not exist in a vacuum, the Government's chief witness was asked whether he knew if "the fencing was on these various lands purchased by Mr. Heasley at the time he purchased them." (T. 379). The following colloquy then ensued:

"A. I don't know, sir.

"Q. And that they were included in the purchase price of the land?

"A. That I don't know, sir.

"Q. You wouldn't be able to say?

"A. No, sir.

"Q. Well, if they were, then you have charged him twice, haven't you, assuming that the fencing was on the lands at the time he bought them, and they were included in the purchase price which you have set down here as another item, another asset? Would you not agree that you have charged him twice for the fencing?

"A. Yes, sir, on the net worth statement." (T. 379.)

A similar line of questioning was pursued with regard to the possible overlap of the item "other buildings" appearing on Exhibit 82 and the land increases.

"Q. What do you mean by 'other buildings'?

"A. It's buildings other than his personal residence and the silo and machine shed.

"Q. According to your theory and the theory as shown in Exhibit 82, then, from time to time as he purchased this land he acquired other buildings, is that the idea?

"A. Yes, sir.

"Q. Did you investigate to find out whether or not those other buildings were actually on the land when he purchased it and were included in the purchase price?

"A. No, sir, I did not.

"Q. Then you are not able to say whether they were or not?

"A. No, sir.

"Q. If they were, they ought not to appear here as additional assets, should they?

"A. No." (T. 383)

The Government's witness was also questioned as to the figures contained in Exhibit 82 reflecting the value of the land shown thereon.

"Q. Where did you get those figures, that is, the consideration or the purchase price? Is that consideration or is it some estimate of the value of the lands themselves?

"A. That is based in many instances on the land itself; the consideration in connection therewith is based in many instances on the deed.

"Q. That is, the consideration shown in the deed?

"A. If the consideration was shown in the deed, yes, sir.

"Q. And as to those where the deeds do not show consideration, where do you get your values?

"A. I got the value either from the testimony offered by Mrs. Peterson or Mr. Moran or Mr. Satre who testified here or as in two instances, I believe, from Mr. Heasley.

* * * * * * * *

"Q. Did you investigate to find out whether or not during those years some or a portion of these lands were owned by the defendant's son?

"A. Well, according to the deed records, Mr. Heasley bought the land.

"Q. In the first place?

"A. Yes, sir.

"Q. All right. That doesn't prevent that being transferred later on, does it?

"A. It doesn't prevent it but if such were the case the document wasn't recorded that I could find.

"Q. But it could still be transferred without the recording of a document, couldn't it?

"A. Yes, sir.

"Q. Recording isn't necessary for a valid transfer, is it?

"A. Not to my knowledge.

"Q. Now, do you know that Mr. Heasley has, in addition to a son, two sons-in-law, married to his two daughters?

"A. I don't know, sir.

"Q. Don't you know that all three of those boys were farming on these lands that you set up in Exhibit 82 during these years of '46, '47, '48 and '49?

"A. I don't know who farmed them, sir.

"Q. You don't know who farmed them. There is nothing on your record here to indicate that in any way and you didn't investigate to find out whether it was true or not, did you?

"A. No, sir.

"Q. And that in some instances these children or some of them obtained the whole hundred percent of the income off of some of these lands? You wouldn't know that?

"A. No, sir.

"Q. And you didn't investigate to find out, is that correct?

"A. I had no idea such was the situation, sir." (T. 384-386).

We do not believe it is necessary to set out in greater detail portions of the record which indicate, as we believe these preceding portions indicate, the utter unreliability of the figures and calculations contained in the Government's net worth summarization. As the Fifth Circuit noted in *Vloutis* v. *United States,* 219 F. 2d 782, 791 (C.A. 5): "the calculations made in these cases are only as sound as the investigation is complete . . . "

The trial judge made no mention in his charge of the weaknesses and insufficiencies in the Government's

investigation or evidence, and instead commented upon Exhibit 82 in a manner which tended to strengthen its impact and dignify its significance:

> "Exhibit No. 82, which has been offered and received in evidence, is claimed by the Government to be a summary of all the evidence offered and received here from which the Government can show increases in net worth for the years in question. That exhibit has been explained to you and, of course, will be examined by you when you get into your jury room. I see no particular profit to be gained by the Court's going over the various figures with you." (R. 30)

There thus was permitted in this case precisely the "danger" this Court cautioned against in *Holland:*

> "There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. *The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts, summarizing the computations;* bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." 75 S. Ct. at 131. (Emphasis added.)

The instruction given by the trial judge in this case encouraged rather than detracted from the possibility that the "bare figures" in Exhibit 82 might acquire "an existence of their own, independent of the evidence which gave rise to them", *Ibid;* was in direct violation of this Court's admonition in the *Holland* case; and was plainly detrimental to Petitioner.

C. Failure to Instruct Jury Adequately Regarding Net Worth Method

In the *Holland* case this Court observed that the net worth method "requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income"; that "such an assumption has many weaknesses"; and that therefore, "courts must minimize this danger," 75 S. Ct. at 132. Because of the "pitfalls inherent in the net worth method ... the exercise of great care and restraint" is required. *Ibid.* In consequence, this Court admonished:

> "Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. *Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused." Holland* v. *United States,* 75 S. Ct. at 132. (emphasis added.)

Even a cursory examination of the trial judge's charge (R. 26-37) indicates that he did not "exercise the great care and restraint" which this Court has called for. Though the charge comprises ten printed pages, only a little over one page is devoted to a discussion of net worth problems (R. 29-30). It can hardly be expected that the trial judge—after a trial of more than a week reported in approximately 700 pages of transcript—could, in so few words, have properly presented to a jury of laymen unfamiliar with the principles and nuances of criminal tax law "a summary of the nature of the net worth method, the assumptions

on which it rests, and the inferences available both for and against the accused."[5]

Though the trial judge did state the elements of the net worth theory which it was necessary for the Government to prove, he nowhere in the net worth portion of the charge mentioned any of the "inferences available . . . for . . . the accused" nor did he adequately state the "assumptions upon which [the net worth method] rests." This portion of his charge was not "especially clear," contained no "guarding instructions," nor did it in any way minimize the dangers inherent in the net worth method. Indeed, by addressing himself only to what it was "incumbent upon the Government" to establish without once mentioning the inferences available to or the safeguards the law places around the accused, the trial judge appears to have "ensnared" the defendant in the very dangers and pitfalls which this Court sought to protect against.

* * * * * * *

In Sections IA and IB, *supra,* we have also shown that the trial judge incorrectly charged the jury with respect to the standard of proof necessary to establish Petitioner's opening net worth, and failed to caution the jury with respect to the weaknesses in the Government's net worth summarization. In Section II, *infra,* we discuss a portion of the trial judge's charge which we believe in and of itself constituted reversible error. But certainly when all of these are taken together one must conclude "after pondering all that happened" that the jury's judgment was substantially swayed by the errors and substantial rights were affected. *Cf. Kotteakos* v. *United States,* 328 U. S. 750, 765.

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[5] And these instructions must be "in addition to the formal instructions." *Holland* v. *United States, supra* at 132.

II.

Since Petitioner's net worth statement could show his net worth only for the beginning of 1944, and the prosecution years were 1946 through 1949, the Government had introduced in evidence Petitioner's income tax returns for 1944 and 1945 (T. 167-168). If the Petitioner's opening net worth had been definitely and accurately established, his income tax returns for 1944 and 1945 might properly have served as links in the evidentiary chain establishing Petitioner's net worth at the begininng of the prosecution period, *i.e.*, January 1, 1946.

In his charge to the jury, the trial judge sought to explain that the introduction in evidence of the returns for 1944 and 1945 was no claim that Petitioner had violated the income tax laws in those years. He then continued as follows:

> "Such returns, that is, prior to 1946, were received solely for use by the Government *in establishing a base or a starting point in proving its net worth theory.*" (R. 30) (Emphasis added.)

The returns for 1944 and 1945 clearly did not nor could not establish "a base or a starting point." At best, they could serve as a connection between the starting point at the close of 1943 and the prosecution years beginning in 1946. Characterizing them as being used to establish a starting point seems clearly erroneous.

Moreover, since this statement was contained in the net worth portion of the charge[6] and no

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[6] The statement in the charge repeated the error made by the trial judge during the trial at the time the returns were introduced, when he said:

> "These exhibits are offered solely . . . to establish the net worth of the defendant as of January 1, 1944. Have that in mind." (T. 168)

reference whatsoever was made to Exhibit 11—the extra-judicial statement purporting to establish Petitioner's opening net worth—the jury certainly must have received the impression that Petitioner's opening net worth had been established by his own income tax returns. Such a shifting of emphasis, however unintended, was plainly prejudicial and confusing.

This Court held in the *Holland* case that the proper use of the net worth method requires as

> "an essential condition . . . the establishment, with reasonable certainty, of an opening net worth to serve as a starting point from which to calculate future increases in the taxpayer's assets." *Holland* v. *United States, supra,* at 134.

A reading of the four "net worth" decisions makes plain the importance of the opening net worth figure: indeed this Court referred to it as the "cornerstone of the Government's foundation of guilt." *Smith* v. *United States,* 75 S. Ct. at 198. Where a trial judge ineptly refers to income tax returns as establishing this "cornerstone," we believe he has violated all of the admonitions of this Court with regard to the opening net worth figure, with the consequence that any conviction stemming from such a trial should not be permitted to stand.

III.

A necessary element for conviction of tax evasion is willfulness. A "fair statement of the rule" is that willfulness

> "involves a specific intent which must be proven by independent evidence and . . . cannot be inferred from the mere understatement of income." *Holland* v. *United States, supra,* at 137.

At the same time, because of the increased "chances for error" when the net worth method is used in ordinary income-bracket cases, this Court has admonished both trial and appellate courts to be particularly careful since

> "an inference of willfulness from net worth increases alone might be unjustified, especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation." *Holland* v. *United States, supra,* at 132.

We submit that such are the circumstances here. As the Court below noted in its opinion, Petitioner had only a grade school education, and had no knowledge of accounting or the requirements of the revenue laws. For the years involved he had turned over all of the records he had to an accountant, and he relied upon this accountant to prepare his income tax returns. (App. 2). Petitioner testified that he personally had nothing to do with preparation of his returns (T. 476) and relied entirely upon the advice of this accountant (T. 477). Indeed, Petitioner had apparently signed the returns in advance in blank and the accountant "filled them out after I was gone." (T. 504, 526). He felt justified in doing so since the accountant had been recommended to him by the Deputy Internal Revenue Collector (T. 474-5). At the time of the trial the accountant was dead (T. 477), and Petitioner himself was unable to answer many of the questions regarding the manner in which certain transactions were treated on his tax returns. (e.g. T. 514, 523, 546).

Moreover, many of these transactions were exceedingly complicated since Petitioner often acted as payer and receiver of and for funds of members of his family

(T. 483, 414-419), friends and neighbors (T. 485-6, 421-425) and even the public administrator (T. 420).

Because Petitioner was a farmer, willfulness could not be inferred from the absence of books and records, *cf. Holland* v. *United States, supra,* at 137, since, as the trial court properly noted, farmers with no income except from farming are "relieved from the duty of maintaining customary account books." (R. 32). Since Petitioner did not himself prepare his own returns, and relied entirely on his accountant, the "evil motive," 10 *Mertens Law of Federal Income Taxation,* Sec. 55.41 (1948 Rev. Ed.), the "specific intent," *Holland* v. *United States, supra,* necessary to support criminal culpability appear to be lacking in this case. *Cf. Vloutis* v. *United States, supra,* at 794. See also *Spies* v. *United States,* 63 S. Ct. 364, 368.

The portion of the trial judge's charges on willfulness failed to caution the jury with regard to the danger of drawing "an inference of willfulness from net worth increases alone"; nor did it point out the need for independent evidence other than "mere understatement of income" to support the finding of willfulness—which was an essential element in the offenses charged. *cf. Morissette* v. *United States,* 72 S. Ct. 240, 256.

Pummelled by blows going to net worth, receipts and disbursements, and expenditures, with proof from each intermeshed with and feeding upon the proof from the others, with circumstance added to circumstance, and inference piled upon inference, there was little which Petitioner could do or say to shield himself from the converging and cumulating implications, however unjustified. He could have been "entirely honest and yet unable to recount his financial history." *Holland* v. *United States, supra,* at 131.

The record in this case presents the picture of a farmer, unequipped by training or education to maintain accounting records accurately reflecting his farming operations—which were intermeshed with those of members of his family, neighbors, and other nearby landowners—relying entirely upon an accountant to prepare his income tax returns for him. Against the Government's re-creation of his financial status and transactions of five years or more before, and after the accountant who had prepared his tax returns had died, he stood hopelessly engulfed and entangled.

While it has been said that "The doctrine of *respondant superior* is not to be drawn from the law of negligence and applied to criminal liability", *Lurding* v. *United States,* 179 F. 2d 419, 421 (C.A. 6), this Petitioner nevertheless is in the last analysis being held criminally accountable for the acts of omission and commission of his accountant.

In this respect, this case presents a question which has been arising with increasing frequency: the extent to which a taxpayer may be held to have violated Section 145(b) of the Internal Revenue Code of 1939 where his income tax returns are prepared by someone other than himself, and without any supervision from him, *e.g., cf., Berkovitz* v. *United States,* 213 F. 2d 468, 476 (C.A. 5); *Wardlaw* v. *United States,* 203 F. 2d 884, 793-4 (C.A. 5); *Vloutis* v. *United States, supra* at 785, 793-4; *Hartman* v. *United States,* 215 F. 2d 387, 394-5 (C.A. 8); see also *Bloch* v. *United States,* 221 F. 2d 786, 788-790 (C.A. 9); and the confusion which these decisions reflect suggest that there is need for this Court to speak on the problem. In an era when more and more taxpayers in every station of life and in every income-bracket are forced to employ account-

ants or attorneys to prepare their tax returns, a definitive statement from this Court is needed now on the extent to which the errors of these employees may be used against a taxpayer in a criminal proceeding.

CONCLUSION

In conclusion, we believe it appropriate to repeat the observation made at the beginning of this Petition: that the principles which this Court's "net worth" decisions established can have force and effect only to the extent that they are carefully and consistently applied by the federal courts in appropriate cases. If they may be improperly applied, if they may sometimes be disregarded, the practical protection this Court so painstakingly fashioned loses its high function. Moreover, since there are great dangers inherent in the net worth method, a failure to carefully control and restrict its use in accordance with the principles laid down by this Court may result in serious injustice to the innocent.

* * * *

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

(Opinion)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,091

FAY HEASLEY, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the District of North Dakota

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[January 13, 1955.]

Submitted on brief (Francis Murphy was on the brief), for Appellant,

Ralph B. Maxwell, Assistant United States Attorney (Robert Vogel, United States Attorney, was with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and JOHNSEN and COLLET, Circuit Judges.

GARDNER, Chief Judge.

Appellant was convicted on three counts of an indictment which charged him with willfully and knowingly attempting to defeat and evade a large part of his Federal income taxes

for the years 1946, 1947 and 1948 respectively. He was acquitted on Count IV of the indictment which charged him with a similar offense for the year 1949. We shall refer to appellant as defendant. During the times here involved defendant was a farmer and carried on extensive farming operations in North Dakota. He claims to have kept no books of account or record of his farming operations or financial transactions. In his income tax return for the year 1946 he reported $317.00 as tax due and owing; for the year 1947 he reported $150.50 as tax due and owing; and for the year 1948 he reported $240.00 as tax due and owing. It was charged in the indictment that there was in fact justly due and owing for the year 1946 the sum of $12,007.45; for the year 1947 the sum of $19,093.14; and for the year 1948 the sum of $27,518.36. In the absence of any books of account the government attempted to prove the allegations of the indictment by the receipts and disbursements method and by the so-called net worth method. It was the contention of defendant that he had only a grade school education, that he had no knowledge of methods or systems of accounting or of the requirements of the revenue laws, that for the various years involved he had turned over all the records he had covering each year's business to John Schoonover, an expert accountant, and that he had relied upon Schoonover to prepare his tax returns and that the returns which he signed were prepared by Schoonover and believed by defendant at the time they were made to be substantially correct. As Mr. Schoonover had prior to the time of trial died it was not possible to secure his testimony.

The counts of the indictment are identical except as to the period involved and amounts of income and tax designated therein. Count I may be taken as typical. It reads as follows:

> "That on or about the 10th day of February, 1947, at Fargo, in the District of North Dakota, one Fay Heasley, late of Eldridge, North Dakota, did willfully and knowingly attempt to defeat and evade a large

part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of North Dakota, at Fargo, North Dakota, a false and fraudulent income tax return wherein he stated that his adjusted gross income for said calendar year was the sum of $4,071.03 and that the amount of tax due and owing thereon was the sum of $317.00, whereas, as he then and there well knew, his adjusted gross income for the said calendar year was the sum of $31,563.58, upon which said adjusted gross income he owed to the United States of America an income tax of $12,007.45."

In due course defendant interposed a motion to dismiss the indictment on the grounds that "the said Indictment and each and every count thereof fails to set forth or describe a public offense as defined by the laws of the United States, in that the Internal Revenue Act in force at the times set forth in the various counts in said Indictment required the payment of tax only upon net incomes of individuals and that said Indictment and each and every count thereof wholly fails to allege that the said defendant did not during the times mentioned in each of said counts actually return and pay a proper amount upon his net income for each of the years involved." The motion was denied. At the close of the government's testimony and again at the close of the entire case defendant interposed a motion for judgment of acquittal on the grounds that "there is a variance between the indictment and the proof offered in that the Government's indictment charges an evasion of adjusted gross income tax for the four years involved and for the further reason that the testimony offered in behalf of the Government is based in substantial measure upon opinion or conjecture and asked this jury to arrive at a conclusion in a substantial measure based upon

such opinion or conjecture on the part of the Government's witnesses." Both motions were denied and the case was sent to the jury by the court on instructions to which the defendant saved certain exceptions to be hereinafter noted. The jury as hereinbefore observed found the defendant guilty on Counts I, II and III and not guilty on Count IV. On the verdict thus returned the court entered judgment and sentence of imprisonment for a period of three years on each count, the sentences to run concurrently.

Defendant seeks reversal of the judgment and sentence thus imposed on substantially the following grounds:

1. The trial court erred in refusing to dismiss the indictment.

2. The trial court erred in receiving in evidence government's exhibit 82—net worth summarization.

3. The trial court erred in denying the motion for judgment of acquittal at the close of the government's case and at the close of the entire case.

4. The trial court erred in instructing the jury in effect that the charge of fraudulent report of adjusted gross income was a sufficient basis for determining whether or not an attempt had been made to evade a tax.

The sufficiency of the indictment is challenged because it includes a charge that the defendant in his income tax returns willfully and knowingly understated the amount of his adjusted gross income, it being argued that the amount of taxes due from a taxpayer is not depended upon the amount of his adjusted gross income but such tax is levied upon his net income.

The indictment embodies the words of the statute and ordinarily an indictment for a statutory offense is sufficient where the charge is made in the words of the statute. The defendant is charged with a willful and fraudulent attempt to defeat and evade a large part of his income tax

by understating his adjusted gross income. The indictment would have been good had it not embodied the additional charge or information as to the manner in which the evasion was attempted. Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides that:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

This indictment specifically informed the defendant of the time of the commission of the alleged offense, of the place of its commission, of the method by which he was alleged to have committed it, and it informed him as to what amount he paid and the amount which he should have paid. Had defendant desired further information he could have asked for a bill of particulars and the fact that the indictment informed him of the amount reported by him as his adjusted gross income and the amount of his actual adjusted gross income did not, we think, impair its validity nor make it vulnerable to the charge of indefiniteness and uncertainty. From the facts stated the court could say that

there was an income tax due from the defendant to the government and the defendant was definitely advised as to the amount of income tax unpaid. We think the allegations of the indictment fully satisfied the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure and informed defendant of the nature and cause of the accusation against him within the meaning of all Constitutional provisions. *Cochran and Sayre* v. *United States,* 157 U.S. 286; *Risken* v. *United States,* 8 Cir., 197 F.2d 959; *Cave* v. *United States,* 8 Cir., 159 F.2d 464; *Hewitt* v. *United States,* 8 Cir., 110 F.2d 1; *Capone* v. *United States,* 7 Cir., 56 F.2d 927; *Guzik* v. *United States,* 7 Cir., 54 F.2d 618; *United States* v. *Rosenblum,* 7 Cir., 176 F.2d 321; *Himmelfarb* v. *United States,* 9 Cir., 175 F.2d 924; In *Hewitt* v. *United States, supra,* quoting from *Hagner* v. *United States,* 285 U.S. 427, the requisites of an indictment are thus stated:

> "'The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."'"

We think this indictment clearly advised the defendant of the facts constituting the offense with which he was charged and a conviction or acquittal would be a bar to a further prosecution for the same offense.

As the defendant produced no books or records reflecting his farming operations or financial transactions government accountants attempted to ascertain the extent of his income by the so-called net worth method. The results of their computation was embodied in what is referred to as a sum-

marization identified as exhibit 82. When the exhibit was offered in evidence it was objected to on the ground that proper foundation had not been laid and that it was incompetent and immaterial because it purported to show the adjusted gross income of defendant for the years in question. Defendant signed and swore to a statement identified as exhibit 11 which reflected his net worth as of January 1, 1944. As to this statement he said in part as follows:

> "I, Fay Heasley, hereby certify that the above list of assets and liabilities constitute a true and complete list of my holdings and of my debts as at January 1, 1944. I certify that at that date I had no other assets and no other liabilities. The above figure regarding cash represents the amount on deposit at the National Bank of Jamestown in my checking account and I certify that I had no other cash in any bank, at home, or at any other place. Again, the above list is a true and complete picture of my financial standing as at January 1, 1944."

This definitely fixed a starting point from which the government accountants prepared exhibit 82 showing defendant's net worth for the years 1946, 1947, 1948 and 1949. It is argued that the corpus delicti may not be proven alone by extra-judicial statements. This contention is doubtless correct but the weakness of this argument is that it goes to the weight or sufficiency of the evidence and not to its competency. In the cases relied upon by defendant the question was not as to the admissibility of the testimony but as to its sufficiency to prove the corpus delicti. The government in the instant case does not rely on this testimony alone as proof of the corpus delicti. It is relied upon as corroborative of the facts sought to be established by the testimony as to defendant's receipts and disbursements for the years in question. Whether or not the testimony standing alone would be sufficient to establish the guilt of the defendant is not the test of its admissibility.

We have consistently approved the use of the so-called net worth method of determining taxable income in conjunction with the receipts and disbursements method. *Schuermann* v. *United States*, 8 Cir., 174 F.2d 397; *Hanson* v. *United States*, 8 Cir., 186 F.2d 61; *Olson* v. *United States*, 8 Cir., 191 F.2d 985; *Leeby* v. *United States*, 8 Cir., 192 F.2d 331. There was no error in admitting exhibit 82.

By his motion for acquittal interposed at the close of the case defendant laid the basis for challenging the sufficiency of the evidence. As the jury found the defendant guilty the evidence must be viewed in a light most favorable to the government. The government's proof of receipts and disbursements by the defendant for the years involved showed the amount of taxes due and evaded as charged in the indictment. If this evidence was competent it abundantly sustained the verdict returned. The probative value and admissibility of this character of testimony cannot well be questioned. As we have pointed out in *Leeby* v. *United States, supra,* and *Hanson* v. *United States, supra,* the offense here is not one requiring exact proof as to the amount of net income evaded but whether or not the defendant attempted to evade a substantial amount of net income tax. Thus in *Leeby* v. *United States, supra,* we said:

> "It must be borne in mind that this was not an action to recover the amount of income taxes alleged to be due, nor an action in which it was necessary to determine the exact amount of defendant's income for the years in question. On this phase of the case all that it was necessary to show was that there was omitted from the reported income a substantial amount."

We conclude that there was no error in denying defendant's motion for acquittal on the ground of the insufficiency of the evidence.

It remains to consider the contention of defendant that the court erred in its instructions to the jury particularly in its instruction with reference to the adjusted gross income. It is somewhat difficult to gather from the objections made just what counsel had in mind but apparently he did not wish to be in the position of having waived his objection to the indictment. This is manifest from the following part of his objection:

> "What I am objecting to is the Court's approval of the method of drawing the indictment."

We have already considered the question of the sufficiency of the indictment. What the court said in its instructions with reference to the adjusted gross income is followed by a clear statement as to what are the essential elements of the offense as charged. The instruction reads in part as follows:

> "The computation of an adjusted gross income is an essential step toward arriving at a net taxable income upon which the tax which the defendant should pay is computed. Consequently, if the adjusted gross income is incorrectly stated, it then follows that the net income which is derived therefrom would also be incorrect. Adjusted gross income is, roughly speaking, the defendant's profit from his business operations. It is arrived at through deducting from his entire income the cost of doing business. When that figure is arrived at, that is, the adjusted gross income, then the net income is ascertained by subtracting therefrom certain deductions allowed by law. The tax which the defendant must pay is computed from the net taxable income, which must be arrived at through subtracting the exemptions from the net income. Therefore, if the net income is wrong, any subsequent figure based thereon must be wrong. The law requires the defendant to pay an income tax on his net taxable income only, so it follows that in this case the burden is upon the Gov-

ernment to establish to your satisfaction beyond a reasonable doubt the amount of the defendant's net taxable income in each of the years involved in the indictment, and that the defendant has willfully and knowingly substantially failed to make a true report and that he has done so for the purpose of defeating or evading payment of the correct tax."

We think the jury was correctly instructed and that the defendant was accorded a fair trial. The judgment appealed from is therefore affirmed.

APPENDIX B

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,091 September Term, 1954

Thursday, Jan. 13, 1955

FAY HEASLEY, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the District of North Dakota

This Cause came on to be heard on the record from the United States District Court for the District of North Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment and sentence of the said District Court in this cause be, and the same is hereby, affirmed.

And It is further Ordered by this Court, that the defendant in the said District Court, Fay Heasley, do surrender himself to the custody of the United States Mar-

shal for the District of North Dakota, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the Mandate of this Court in the said District Court.

January 13, 1955

APPENDIX C

(Order Granting Leave to File Petition for Rehearing Out of Time and Extending Time for Appellant to Surrender.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,091 September Term, 1954

FAY HEASLEY, *Appellant*,

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the District of North Dakota

Application of appellant has been submitted to the Court for leave to file a petition for rehearing in this cause although the time for fling prescribed in Rule 15(a) has expired. The application and opposing brief on behalf of the Government has been considered by the Court, and, It is now here Ordered that permission to file petition for rehearing by appellant out of time is hereby granted, the petition to be filed on or before April 18, 1955.

An Order of this Court entered March 8, 1955, extended the time thirty days in which the defendant-appellant was required under the mandate to surrender in execution of the judgment and sentence imposed upon him, and this time for surrender is by the Court now hereby further extended until the petition for rehearing permitted to be filed is ruled on by this Court and for a period of ten days after date of such ruling.

April 6, 1955

APPENDIX D

(Order Requesting Briefs in Support of Petition for Rehearing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,091 September Term, 1954

Tuesday, May 31, 1955

FAY HEASLEY, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the District of North Dakota

Ordered by the Court that counsel for appellant-petitioner are called upon to serve and file a full brief in support of petition for rehearing on or before June 15, 1955, and counsel for the Government are then called upon to make reply on the question of whether the recent net worth decisions of the Supreme Court of the United States call for any different consideration or result than this Court has already reached, said reply to be served and filed on or before June 30, 1955.

May 31, 1955

APPENDIX E

(Order Denying Petition of Appellant for Rehearing.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,091 September Term, 1954

Tuesday, July 19th, 1955

FAY HEASLEY, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the District of North Dakota

Petition of appellant for rehearing by leave of Court was permitted after time provided in the Rules of this Court.

The petition has been considered, and after re-examination of the situation in the light of the "net worth" decisions of the Supreme Court and after briefs thereon being submitted by both parties, the Court is convinced that the result reached in the previous opinion, 218 F. 2d 86, was right and is entitled to stand and in consequence of which the petition for rehearing is accordingly hereby denied.

July 19, 1955

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 329

FAY HEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (Pet. App. 1-10) is reported at 218 F. 2d 86.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1955. (Pet. App. 10.) On April 6, 1955, the Court of Appeals granted petitioner leave to file a petition for rehearing out of time. (Pet. App. 11.) The petition for rehearing

was denied on July 19, 1955. (Pet. App. 13.) The petition for a writ of certiorari was filed on August 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the instructions to the jury on the Government's corroborative net worth proof, to which no objection was made in the trial court, were erroneous.

2. Whether the trial court erred when it explained to the jury that petitioner's income tax returns for years prior to the prosecution period were not introduced to show that petitioner had violated the income tax laws in those years, but only to establish a net worth starting point.

3. Whether there was sufficient evidence to support the jury's findings of wilfulness.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed

by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On September 27, 1952, a four-count indictment was returned against the petitioner in the United States District Court for the District of North Dakota, charging him with wilfully attempting to defeat and evade a large part of his income tax for the years 1946 through 1949, in violation of Section 145(b) of the Internal Revenue Code of 1939. The indictment alleged the following to be the amounts of adjusted gross income and the income tax liability, as reported by the petitioner in his return and as corrected. (R. 1-3):[1]

Year	Reported income	Reported tax	Corrected income	Corrected tax
1946	$4,071.03	$317.00	$31,563.58	$12,007.45
1947	4,782.95	150.50	43,368.90	19,093.14
1948	2,939.28	240.00	58,164.78	27,518.36
1949	608.31	.....	16,441.59	3,828.72
Total	$12,401.57	$707.50	$149,538.85	$62,447.67

On February 12, 1954, after a trial lasting eight days, the jury returned a verdict of guilty on

[1] References to the printed record will be designated "R." References to the reporters' transcript of the evidence, which has been certified to this Court, will be designated "Tr."

counts 1, 2, and 3 and not guilty on count 4. (R. 37.) Petitioner was sentenced to a term of imprisonment for three years on each count, the sentences to run concurrently. (R. 38.) The Court of Appeals unanimously affirmed. (Pet. App. 10.)[2]

The evidence may be summarized as follows:

Direct proof of evasion. With the exception of four or five cancelled checks, petitioner, who earned his income from farming operations, furnished no books or records to the agent investigating his tax returns. He told the agent that although he had kept his original records, he had stored them in his attic where almost all of them had been destroyed by rats and mice. (Tr. 15.) Petitioner later told the agent that he could find no records at all, and testified at the trial that he had kept his original records in a pasteboard box, but could no longer find them. (Tr. 480.)

Without any records, the Government was forced to make exhaustive investigations to ascertain the amounts of income petitioner had received and the expenditures he had made. The Government proved the amount charged in the indictment by

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[2] After the period allowed by the Rules of the Court of Appeals to petition for rehearing had elapsed, petitioner requested leave to file an out of time petition for rehearing. The Court of Appeals granted leave (Pet. App. 11) and requested briefs from the petitioner and the Government on the question whether the net worth decisions of this Court (*Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160) called for a different result from that already reached. (Pet. App. 12). The Court denied the petition for rehearing (Pet. App. 13.)

showing what sums the petitioner had received during each year in question. The agents examined the records of all elevator companies, county agricultural offices, banks, creameries, public offices and other concerns with which it was considered likely that petitioner had done business. (Tr. 18.) In this way, the agents ascertained petitioner's income from sales of grain to elevators and grain companies (Tr. 191-202, 204-206, 209-214, 214-216, 217-218), sales of butter fat to creameries (Tr. 239-244), emergency wheat and dairy subsidy payments from the Commodity Credit Corporation (Tr. 278), soil conservation payments from the Agricultural Stabilization and Conservation Office (Tr. 278), and payment for services to the county (Tr. 206-208). Petitioner understated his receipts by $20,127.78 in 1946. In 1947 and 1948 he failed to report $31,620.82 and $41,471.21 in receipts. (Ex. 88; R. 22-25.) The Government's direct evidence of specific receipts thus showed that petitioner had received a total of $93,219.81 which had never found its way into his income tax returns.

The Government also proved that petitioner had overstated his deductible expenses, showing that the expenses set out in his returns substantially exceeded those allowed. (Tr. 258.) This evidence showed that petitioner had overstated his deductible expenses by $2,150.73 in 1946, $6,965.13 in 1947, and $13,634.29 in 1948. (Ex. 88, R. 22-25.)

In sum, combining unreported receipts and overstated expenses, the Government's evidence showed the following understatements of taxable income

for each of the prosecution years. (Ex. 88, R. 22-25.)

Year	Understatement of income
1946	$22,278.51
1947	38,585.95
1948	55,225.50
Total	$116,089.96

Petitioner attempted to show that part of these receipts were from property he had originally owned but had transferred to his son. (Tr. 384-386.) This was countered by proof that he had claimed the son as a dependent in his income tax returns. (Tr. 504.) In addition, the son testified that he did not fill out his own returns or pay his own tax and had no idea of what his tax liability was, leaving all this to his father. (Tr. 586-592.) The evidence showed only a small amount of income reported in the son's returns. (Tr. 593-607.) Furthermore, all the property in question was recorded under petitioner's name. Petitioner's claim that the land was owned by his children rested solely on unrecorded deeds. (Tr. 384-386.)

Since 1942 petitioner had engaged John Schoonover, an accountant, to fill out his income tax returns. (R. 21.) Schoonover, who had died by the time of the trial, apparently made no independent audit, but used the figures furnished by petitioner. (Tr. 476.) Petitioner testified that he had delivered all of his records to Schoonover each year and had relied on his advice. (Tr. 476.)

Indirect proof of tax evasion. The Government relied on the direct proof of income tax evasion described above, and the trial court so charged the jury. (R. 30.) In addition to and in corrobora-

tion of the direct proof, the Government also prepared an analysis of petitioner's net worth. On May 17, 1950, an agent met with the petitioner in the office of the Deputy Collector of Internal Revenue, Jamestown, North Dakota. Working with petitioner, the agent prepared a statement of petitioner's net worth as of December 31, 1943. (R. 8.) All of the figures, except for cash in the bank, were supplied by petitioner from his memory. (R. 10.) The bank balance figure was read to petitioner, and he confirmed it. (R. 9.) The completed net worth statement was shown to petitioner, and he signed a statement certifying it as a complete list of his assets and liabilities as of January 1, 1944. (Ex. 11, R. 14-15.) He certified that he had been warned that the Government could use the statement in any way it saw fit and that the information was voluntarily given. He also stated that since January 1, 1944, neither he nor his wife had been given any money or inherited any. (Ex. 11, R. 14-15.)

Using the statement as a starting point, with the aid of income tax returns filed by petitioner for 1944 and 1945, the Government made an analysis of petitioner's net worth increases for the years 1944 through 1949. (Ex. 82, R. 16-17.) This analysis showed that petitioner had adjusted gross income in 1946, 1947, and 1948 far exceeding the amounts reported on his returns.

ARGUMENT

Though it is not questioned, and, indeed, is scarcely mentioned in the petition, there was ex-

tensive direct proof in this case that petitioner had received large amounts of taxable income which he had never reported. (Ex. 88; R. 22-25.) These sums included payments from grain elevators, creameries, and local and federal agencies. (See Statement, *supra*, p. 5.) The Government submitted a net worth computation (Ex. 82; R. 16-17), but the investigating agent testified that the Government did not rely primarily on it and submitted it only to corroborate the direct evidence of tax evasion. (R. 19.) The trial court so instructed the jury. (R. 30-31.) Thus, the principles of this Court's recent net worth decisions (*Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; and *United States* v. *Calderon*, 348 U.S. 160) are at most of secondary importance here. But even apart from this crucial defect in the petition, the questions raised are unsubstantial. The net worth evidence was properly received and adequately explained to the jury in a charge (R. 29) to which the objections now presented were never raised in the trial court. And there is no merit in the claim that wilfulness was not sufficiently proved because petitioner's returns were prepared by an accountant; the jury had ample grounds to find that petitioner had not disclosed his unreported income to the accountant.

1. Petitioner claims that the trial court erred in not instructing the jury as to the weaknesses of the net worth starting point. (Pet. 10.) He made no such objection at the trial and could show a

basis for reversal now only by establishing that there was plain error affecting his substantial rights. (Rules 30 and 52, Federal Rules of Criminal Procedure.) Far from making such a showing, petitioner merely asserts that, with one exception, he furnished the starting point figures from memory in an extra-judicial statement voluntarily made to Government agents. (Pet. 8.) Since petitioner produced no records (see Statement, *supra,* p. 4), his own statement, made with the realization that the Government could use it against him (Ex. 11; R. 14-15), supplied the best possible source of information as to his opening net worth. Petitioner now claims that his memory may have been faulty, but it was for the jury to consider all the circumstances surrounding the giving of the statement and to give it whatever weight it deserved. *United States* v. *Calderon,* 348 U.S. 160, 163.

Moreover, the Government's direct proof that petitioner had received specific items of income amounting to many thousands of dollars which he never reported (Ex. 88; R. 22-25) corroborated the extra-judicial statement of opening net worth. As this Court pointed out in *Smith* v. *United States,* 348 U.S. 147, 158, independent evidence which tends to establish the crime without resort to the net worth computation can serve as corroborating evidence.

The trial court's charge is also criticized in the petition, again for the first time, on the asserted ground that the significance of the starting point

was not adequately explained. (Pet. 11.) However, the court told the jury that the increases in net worth could be considered to be net income only if "there is a fixed starting point at which the taxpayer's financial condition can be affirmatively established". (R. 29.) The court further charged the jury that it was incumbent upon the Government to prove beyond a reasonable doubt that the increase in net worth did not come from a surplus in prior years. (R. 29.) He cautioned that the starting point net worth must be satisfactorily established in order to foreclose the hypothesis that the net worth increases were derived from prior accumulations. (R. 29.) Petitioner finds fault with the words "satisfactorily established," arguing that it was error for the court not to instruct the jury that the starting net worth must be established with "reasonable certainty." (Pet. 11.) But this is a semantic quibble. The jury was amply instructed on the requirement of proof beyond a reasonable doubt, and the difference between a starting point "satisfactorily established" and one proved with "reasonable certainty" could hardly justify reversal on petitioner's belated objection.

The only mention that the petitioner makes of the Government's direct evidence comes as an attempt to cast doubt upon the reliability of the net worth computation on the ground that the latter yielded results greatly exceeding the amounts of unreported income that the Government proved

directly. (Pet. 12.) This argument would have substance only if (1) the Government were required to prove the exact amount of taxes evaded or (2) it had to be assumed that the amounts established by direct proof were all petitioner failed to report. But petitioner concedes, as he must (Pet. 12), that proof of the exact amount evaded is not required. And there is no basis for assuming that the Government's direct proof succeeded in showing the full extent of the evasion. Moreover, since the Government relied primarily on its direct evidence, which showed a smaller but still substantial amount of tax evasion in each year, petitioner has no ground to complain. The decisive point is that both groups of evidentiary facts—the direct proof, primarily relied upon, and the corroborative net worth evidence—established large amounts of unreported income. Cf. *Smith* v. *United States,* 348 U.S. 147, 151-152.

Petitioner next attacks the Government's computation of net worth by references to portions of the testimony designed to show that the Government's figures were inaccurate. (Pet. 12-15.) However, the asserted inaccuracies were for the jury to consider, and petitioner's argument amounts only to a disagreement with the inferences the jury was entitled to draw. The Government's evidence refuted petitioner's explanation that some of his receipts, proved by direct evidence to have been unreported, were from land belonging to his children. (See Statement, *supra,* p. 6) As to the alleged, but not proved, overlap between

land and fencing and other buildings in the Government's net worth computations (Pet. 12-14), even if the computations had erred in this respect, the balance of the net worth increases remained unchallenged and was clearly great enough to support the jury's finding that petitioner had substantial amounts of unreported income. There is thus no reason for further review of the evidence by this Court.

Also without merit is petitioner's contention that the court allowed the jury to take the net worth statement into the juryroom without guarding instructions (Pet. 18), and even gave added dignity to the exhibit by the remarks petitioner quotes (Pet. 16). The court pointed out that Exhibit 82 was only a claim by the Government to be a summary of the evidence received. (R. 30.) This riveted the jury's attention on the actual evidence it had heard, and suggested no basis for a belief in the mind of a reasonable juror that the document itself had evidentiary weight. The brief remarks petitioner quotes merely gave an accurate description of the exhibit and of its limited purpose; they plainly fail to justify the assertion (Pet. 16) that their effect was "to strengthen its impact and dignify its significance."

2. The Government introduced petitioner's income tax returns for 1944 and 1945 to help bridge the gap between the opening net worth statement and the first prosecution year. (Tr. 167-168.) The trial judge instructed the jury that the returns were introduced solely in establishing a

starting point and were not designed to claim that petitioner had violated the income tax laws in those years. (R. 30.) There is no merit in the claim (Pet. 19-20) that this was reversible error because it gave the jury the impression that these returns were conclusive proof of the validity of the Government's opening net worth statement.

Again, it is significant that there was no objection to this passage in the instructions; but an objection would have been groundless in any event. The first prosecution year was 1946, and it was obviously necessary for the Government, which had used petitioner's admission of his net worth at the close of 1943 as a starting point, to show what his income was during 1944 and 1945. We think it clear that this is the only interpretation a reasonable jury could have put upon the passage of which petitioner complains.

3. Finally, petitioner presents the question (Pet. 4) whether his failure to report most of his income could properly have been found wilful inasmuch as he left the preparation of his returns to an accountant who had died before the trial. Neither the question nor the argument that it is an important one warranting certiorari (Pet. 23) is substantial.[3]

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[3] Though it is not presented as an issue for review, there is some argument in the petition (p. 22) that the charge on wilfulness was inadequate. However, the trial court carefully explained that the net worth computation was merely an effort to show unreported income (R. 29), and that the jury could convict only if it found that petitioner had understated his income with a criminal intent to escape the payment of

The issue before the jury on this aspect of the case was simply whether petitioner had deliberately and wilfully misstated his income to his accountant, and thus had known that the returns, prepared by the accountant and signed by petitioner, were false. In addition to its consideration of the evidence showing understatements of income in substantial amounts, the jury heard petitioner's testimony, had opportunity to observe him, and was entitled to pass judgment on his credibility. The records petitioner had allegedly given to the accountant might have thrown further light on the question, but petitioner testified that they had disappeared or had been destroyed by mice. (See Statement, *supra*, p. 4.) In view of the great size of the understated income over a three-year period and petitioner's shifting and questionable explanation for the disappearance of his records (cf. *Spies* v. *United States*, 317 U.S. 492, 499), the evidence amply supports the jury's inference of wilfulness.

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tax rather than through mere error or negligence (R. 32). These instructions were clearly adequate. They certainly could not constitute the kind of plain error warranting reversal now in view of petitioner's failure to make timely objection.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 329

FAY HEASLEY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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1. The Government argues that many of Petitioner's contentions were not raised at the trial and therefore should not be considered now (Br. in Opp., pp. 8-9, 13, 14). But the trial of this case was held well before this Court rendered its decisions in the net worth cases and, consequently, objections based upon those decisions at the trial were impossible.[1] Moreover, when subsequent to the issuance of the net worth decisions,

[1] Since the briefs and argument in the Eighth Circuit Court of Appeals also preceded the date of the net worth decisions, arguments based upon those decisions could not be made to that Court. But on reargument before the Court of Appeals, all of these objections were clearly raised. See p. 2, *infra*.

this Court remanded ten cases then pending on certiorari "to their respective Courts of Appeals for consideration in the light of" the "principles laid down in the net worth decisions,"[2] it was made manifestly clear that this Court was not willing to permit an accident of chronology to deprive defendants in criminal cases of the important safeguards established by this Court for their protection.

In any event, the arguments presented by Petitioner in the Petition were clearly raised to the Eighth Circuit Court of Appeals on rehearing; and, in denying the rehearing (App. 13), that Court clearly passed upon them.[3] And, since it is the decisions of that Court upon which review is being sought, the questions presented, having been expressly passed upon by the Court below, are now appropriately before this Court.

2. The Government suggests that, because it did not rely solely upon the net worth method in this case and because there may have been so-called direct proof of tax evasion, the principles established by this Court's recent net worth decisions "are at most of secondary importance". (Br. in Opp., p. 8). But whether or

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[2] *Mitchell* v. *United States*, *Goldbaum* v. *United States*, *Banks* v. *United States*, *McFee* v. *United States*, *Brown* v. *United States*, *Watts* v. *United States*, *Beaty* v. *United States*, *Strauch* v. *United States*, and *Burdick* v. *United States*, all reported at 348 U. S. 905; and *Remmer* v. *United States*, 348 U. S. 904.

[3] The Court below, in denying rehearing, held:

"• • • after re-examination of the situation in the light of the 'net worth' decisions of the Supreme Court and after briefs thereon being submitted by both parties, the Court is convinced that the result reached in the previous opinion, 218 F. 2d 86, was right and is entitled to stand • • •." (App. 13).

not there may have been such so-called direct proof, the Government is not excused *with regard to the net worth portion of its case,* from following the rules laid down by this Court for the use of the net worth method.

The jury's verdict in this case was based, so far as we can now tell, upon *all* the evidence at the trial, and we cannot assume that in its deliberations it segregated the net worth proof from the other proof in the case. Similarly, it must be assumed, that the jury considered the evidence in accordance with *all* of the trial judge's instructions, not only those of his instructions which did not deal with net worth. So, if there was error with regard to the net worth evidence or the net worth portion of the charge, who can now say that these errors were not prejudicial to the Petitioner? As the Second Circuit noted under similar circumstances in *United States* v. *Altruda,* 224 F.2d 935, 944: "errors which might otherwise have been disregarded as not affecting the substantial rights of the defendant, here, because of the nature of the prosecution's proof and the exhibits may not be overlooked." And this is also the rule which this Court laid down in *Kotteakos* v. *United States,* 328 U.S. 750, 765:

> "if one cannot say with fair assurance, after pondering all that happened, without stripping the erroneous action from the whole, the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

3. In our Petition, at pp. 8-11, we point out that the trial judge charged that Petitioner's opening net worth must be "satisfactorily established", whereas this Court has required that this crucial figure be

proved "with reasonable certainty". We claim that the difference between the instruction given by the trial judge in this case and the rule laid down by this Court amounts to prejudicial error.

The Government has replied by characterizing the difference as "a semantic quibble" (Br. in Opp., p. 10).

If the difference between "satisfactorily established" and "established with reasonable certainty" is a difference in semantics, it is a semantic difference of the highest possible importance, for it could have meant the difference in this case between conviction and acquittal. Indeed, the difference between "satisfactorily established" and "established with reasonable certainty" is as critical as the difference between "beyond a reasonable doubt" and "by a preponderance of the evidence"; and confusion in a charge between the latter two standards—whether a semantic quibble or not—necessarily requires reversal. See *United States* v. *Crescent-Kelvan Co.*, 164 F.2d 582, 588 (C.A. 3, 1948), where even a trial judge's effort, at the suggestion of the prosecuting attorney, to correct the confusion of these standards in his charge was held to be insufficient, and the convictions were reversed.

Apparently recognizing that Petitioner's argument was in fact more than "a semantic quibble", the Government seeks to avoid the consequences of the trial judge's error by countering that the jury was "amply instructed on the requirement of proof beyond a reasonable doubt" (Br. in Opp., p. 10).

Of course, if the jury had not been amply instructed on the requirement on proof beyond a reasonable doubt, that in and of itself would have required re-

versal. However that may be, the portion of the charge in which the instruction concerning reasonable doubt was contained (R. 33) was not directed to a discussion of opening net worth but was part of the trial judge's general instructions. As such, it could not cure an error made in the net worth portion of the charge, for this Court has expressly admonished that charges in cases involving net worth proof must go beyond "formal instructions" if justice is to be done. *Holland* v. *United States,* 348 U.S. 121, 129.

In this case, the portion of the trial judge's charge on reasonable doubt was in thoroughly general terms and was not pointed towards net worth, and therefore could not by any stretch of the imagination satisfy this Court's requirements relating to the establishment of opening net worth. The net worth decisions stress "the importance of accuracy in this figure" because it is "vital to the Government's case"; and hold that the establishment of an opening net worth "with reasonable certainty" is an "essential condition" in this type of case. *Holland* v. *United States,* 348 U.S. at 132. The trial judge here not only failed to make the establishment of opening net worth with reasonable certainty an essential condition, but instead instructed the jury that the opening net worth figure need only be "satisfactorily established". In so doing, we submit, the trial judge violated one of the cardinal principles promulgated by this Court; and the Government's attempt to characterize this error as one of "semantics" or to attenuate its effect by relying upon another portion of the charge should not now be permitted to becloud this prejudicial error.

4. The Government argues that because a Government agent testified that Petitioner furnished most of

the figures in the opening net worth statement that statement "supplied the best possible source of information as to his opening net worth." (Brief in Opp., page 9). But the Government fails to mention that Petitioner, at the trial, flatly denied having signed the opening net worth statement (T. 445-7).[4] Nor does the Government make any mention of the fact that the opening net worth statement—upon which the correctness of its entire net worth case necessarily depended—contained a basic error which the Government itself must have known. According to the statement, Petitioner had as of January 1, 1944 only $500.00 in liabilities. But in 1950, at the very time that Petitioner allegedly had signed the statement there was pending against him a claim by the United States for certain seed loans for an amount in excess of $1,700 (T. 449, 450); and the very United States attorney who was handling the seed loans' claim against Petitioner was prosecuting him in the instant case (T. 450-1).[5] It therefore comes with little grace for the Government to say at this late date that the only weaknesses in the opening net worth statement resulted from weaknesses in Petitioner's memory (Brief in Opp., page 9). The memories of the Government's attorneys seem at least equally at fault.

Under any circumstances, the Government's argument on the opening net worth statement—as with its

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[4] Petitioner acknowledged the signature on the statement to be his, but claimed that he had only signed a receipt for certain checks which had been returned to him (T. 447). Petitioner also denied that he had given the Government agent the information contained in the statement (T. 446-7).

[5] Reference to this error is not made for the purpose of refuting specific amounts in the Government's net worth case. We raise it here, for the same reason that it was raised at the trial, "to show the inaccuracy of Exhibit 11" (T. 454).

arguments on the other points raised in the Petition —stray far from the mark and obscure rather than meet the central issue. For the fact of the matter remains that this Court has clearly held that an extra-judicial statement of a defendant may not be used to establish his opening net worth unless there is independent evidence to support it, *Smith* v. *United States,* 348 U.S. 147, and in this case, there was no such independent corroborative evidence to support the opening net worth statement, which was questioned not only with regard to its accuracy, but also with regard to its authenticity.[6]

5. In the Petition, we present a question as to whether the necessary element of willfulness—which this Court has held must be proved by independent evidence—was made out in this case (Pet., p. 4). We there point out that Petitioner had at best a grade school education, was unable to cope with accounting or the requirements of the revenue laws, and in consequence turned over all the records he had to an accountant, upon whom he placed total and complete reliance for the preparation of his income tax returns. He signed his returns in advance in blank and the accountant "filled them out after I was gone". See generally Petition, pp. 21-24.

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[6] We recognize that whether the opening net worth statement was Petitioner's, as the Government urged, or whether it was not, as Petitioner claimed, was a question to be determined by the jury. We raise the point here, however, because it particularly illustrates the need for and the importance of this Court's rule that opening net worth may not be based upon a defendant's extra-judicial statement alone, but must be corroborated by independent evidence. This rule would seem to be *a fortiori* applicable where there is a dispute as to the authenticity of a defendant's extra-judicial statement.

The Government contends that the question thus presented is insubstantial. The question of willfulness, according to the Government, was a straight jury issue and it was for the jury to evaluate the Petitioner's testimony, observing him and passing judgment on his credibility. (Br. in Opp., p. 14)

But the Government's argument does not reach the question of whether there could be a finding of willfulness in the circumstances of this case. "Willful" this Court has reminded "is a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States,* 317 U.S. 492, 497. The Government suggests only that the jury could infer willfulness "in view of the great size of the understated income over a three-year period" and from "Petitioner's shifting and questionable explanation for the disappearance of his records." (Br. in Opp., p. 14)

Thus, the Government again argues directly in the face of this Court's holdings in the net worth decisions. In the *Holland* case, it was expressly held that willfulness "cannot be inferred from the mere understatement of income". 348 U.S. at 139. So that with regard to the Government's first point, i.e., that willfulness could have been found by the jury in this case from the "understated income over a three-year period", the Government is in plain error.

The Government is similarly in error with regard to the so-called "shifting and questionable explanation for the disappearance of [Petitioner's] records". In the first place Petitioner's explanation for the disappearance of his records did not "shift". Petitioner stated, both according to the testimony of the Government investigator (T. 15) and in his own testimony (T. 480), that they had been kept in a pasteboard box in the attic of his farm and had been destroyed by rats and mice. Nor is this explanation a "question-

able" one, for the problem of rats and mice on farms is recognized, widespread, and serious. Perhaps, if Petitioner were a banker with offices in a fine building in a large metropolitan city, his explanation would be "questionable". But Petitioner, it must not be forgotten, is a farmer in a rural area in North Dakota.

Moreover, the great reliance placed upon the absence of Petitioner's records by the Government to support the finding of willfulness in this case is all the more extraordinary in view of the fact that those whose income "arises solely from the business of growing and selling products of the soil" are expressly exempted from keeping records *Treas. Reg. 118, § 39.54-1,* pursuant to § 54, *Internal Revenue Code of 1939;* and Petitioner plainly falls within this exemption. Citation of and reliance upon *Spies* v. *United States,* 317 U.S. 492, 499 (Br. in Opp., p. 14) is completely inapposite to the circumstances of this case. Because Petitioner may have kept records which he was not required by law to do, and because he was unable to produce them, the Government has sought to impute "wilfulness," even though no such imputation could be made if Petitioner had kept no records at all.

6. Subsequent to the filing of our Petition, the decision of the Second Circuit in *United States* v. *Altruda,* 224 F. 2d 935 (CA 2, 1955) was reported. The *Altruda* case, in which a tax evasion conviction was reversed, contained many of the factors present in the instant case. Altruda, like Petitioner, had not kept books of account[7] and his records had been destroyed either by fire or by a flood in his basement. The Government there also relied upon the defendant's uncor-

[7] Since Altruda derived his income from the practice of medicine and from investments in securities and real estate, he was required by law to maintain records, whereas Petitioner, a farmer, was exempted from this requirement.

roborated extra-judicial statement to establish opening net worth. Also, the Government introduced in evidence several accounting schedules, similar to those introduced in this case—which were aptly characterized as "a mass of figures", 224 F. 2d at 938—in order "to assist the jury in understanding and considering the evidence." *Id.* at 939; *cf.* T. 313.

In the *Altruda* case, as in this case, a basic net worth summarization contained omissions or inaccuracies which "served to make that exhibit incomplete, inaccurate and misleading". *Compare* 224 F. 2d at 942 *with* Pet., pp. 12-15. There, as here, the "charge of the Court gave to the jury but little guidance as to the interpretation to be placed on the schedules which were introduced in evidence by the Government. It explained none of the calculations shown." *Compare* 224 F. 2d at 943, *with* Pet., pp. 15-16.

But unlike the Eighth Circuit here, the Second Circuit in the *Altruda* case followed this Court's admonition in *Holland* v. *United States,* 348 U.S. at 129, that "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation". In reversing Altruda's conviction, the Second Circuit stressed that:

> (1) "it would take a jury of mathematicians to ascertain the facts out of the confusion created by these schedules" 224 F. 2d at 938-9;
>
> (2) "these Government prepared schedules * * * have a way of acquiring an existence of their own, independent of the evidence which gave rise to them' " 224 F. 2d at 939;
>
> (3) the Government's net worth summarization was inconsistent with many of the facts known to the Government, 224 F. 2d at 942; and

(4) "The charge of the Court gave * * * little guidance as to the interpretation to be placed on the schedules" and "explained none of the calculations" and therefore "did not meet the requirements of a net worth prosecution." 224 F. 2d at 943.

The similarity between *Altruda* and this case is immediately and obviously apparent. If the references to sources and figures of income were changed, the *Altruda* decision would be on all fours with the net worth case against Petitioner. And, we submit, if a detailed analysis like that made by the Second Circuit Court of Appeals in *Altruda* had been made by the Eighth Circuit of the net worth case against Petitioner, the conclusion reached in *Altruda* would necessarily be applicable: "that errors which might otherwise have been disregarded as not affecting the substantial rights of the defendant, here, because of the nature of the prosecution's proof and the exhibits may not be overlooked." 224 F. 2d at 944.

* * *

As the Petition and this Reply Brief indicate, Petitioner has been deprived of the protection and safeguards established by this Court for defendants in net worth cases. A looser and incorrect standard for proving Petitioner's opening net worth, less exacting than that required by this Court, was used in this case (Pet. p. 11). Petitioner's extra-judicial statement, inaccurate and questioned as to its authenticity, was relied upon for the establishment of opening net worth, without independent evidence to support it (Pet., p. 9). Though there were obviously omissions, inaccuries, and ambiguities in the Government's net worth

summarization, it was permitted to go to the jury without any "guarding instructions" (Pet., pp. 12-16). The jury was not adequately instructed with regard to the net worth method (Pet., pp. 17-18). An improper reference was made to Petitioner's returns for non-prosecution years, in our mind, sufficient in and of itself, to require reversal (Pet., pp. 19-20). And finally, the circumstances of this case raise, we believe serious questions as to whether the necessary element of willfulness could have been found to exist, in view of the Petitioner's background, his complete reliance upon an accountant, and the absence of independent evidence heretofore held essential to support criminal culpability (Pet., pp. 21-24).

CONCLUSION

For the foregoing reasons, and those contained in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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